No. 12785

In The
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as FARMERS AUTOMOBILE INTER INSURANCE EXCHANGE, *Appellant (Defendant)*

vs.

LOUISE K. HOLM, *Respondent (Plaintiff)*

Appeal from the United States District Court for the District of Oregon.

HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Brief

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Appeal from the United States District Court
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HONORABLE CLAUDE C. McCOLLOCH, Judge

Appellant's Brief

JURISDICTION

This is an action on a policy of liability insurance commenced in the Circuit Court of the State of Oregon for the County of Multnomah by Louise K. Holm, a citizen and resident of Oregon, against Farmers Insurance Exchange, a reciprocal inter-insurance exchange created under the laws of the State of California, and a citizen and resident of that state (Complaint, Tr. p. 6). The amount in controversy, after excluding interest and

costs, is more than $3,000.00 (Complaint, Tr. pp. 9 and 11). The action was removed to the United States District Court for the District of Oregon upon Defendant's petition (Tr. p. 3). The District Court had jurisdiction under 28 U.S.C.A. Sec. 1332 and 28 U.S.C.A. Sec. 1441.

Final judgment was entered in the District Court against Defendant for $10,000 (the policy limits) and certain other sums appearing in Tr. p. 22. From that judgment an appeal was taken to this court (Notice of Appeal, Tr. p. 22) which has jurisdiction of the appeal under 28 U.S.C.A., Sec. 1291.

SUMMARY OF FACTS AND CONTENTIONS

Plaintiff was injured in an automobile accident by the negligence of one Elmer H. Sondenaa, a boilermaker living in Toledo, Oregon, against whom she recovered a judgment for $12,773.40 and costs. The car operated by Elmer H. Sondenaa at the time of the accident was owned by and registered in the name of his wife, Helen Sondenaa, a co-defendant in the above action, against whom plaintiff was denied recovery. Helen Sondenaa had received the car some months previously as a gift from her father, Amandus von Borstel, a farmer living near Kent, Oregon. Von Borstel had been a member of and policyholder in Farmers Insurance Exchange for a number of

years. The insurance policy was in its essence one to assume any liability incurred by Mr. von Borstel through the operation of a particular vehicle while he owned the same. It did not purport to follow the vehicle through successive changes of ownership; and it was not, in fact, assignable. When a car was transferred to a person not a member of the Exchange, the new owner was required to apply for membership before receiving a new policy on the vehicle. This consequence followed not only from the contract but from Oregon law applicable to insurance exchanges and their members. Nonetheless, the District Court rendered judgment on this contract against the Exchange and in favor of the present appellee, judgment creditor of the husband of a successor owner.

The theory on which plaintiff's complaint was drawn is stated in Paragraph XI thereof (Tr. p. 11) to be one of estoppel. The facts relied on to establish an estoppel, as proved at the time of trial, relate to three circumstances. As to the first—some time in June, 1948, von Borstel called upon Mr. William Lawrence, local agent of the Exchange in The Dalles, Oregon, and stated he intended to give his old car to his daughter as soon as he got a new one, and asked Lawrence what had to be done to transfer the policy. According to von Borstel's testimony (Tr. p. 63), the evidence most favorable to

appellee, Lawrence stated that "the policy would have to be signed by my daughter," either with him or their nearest representative at Toledo. When asked about coverage in the meantime, Lawrence further said, according to von Borstel, that "being a transaction within the family, as long as the premiums were paid on this policy, the policy would cover," (Tr. p. 63). The information thus received by von Borstel he transmitted to Mrs. Sondenaa, (Tr. p. 65) and to her husband, Elmer (Tr. pp. 88, 89). It is plaintiff's contention that these facts raise an estoppel against the Exchange to deny that the policy protected the Sondenaas. It is defendant's contention that Lawrence lacked authority to bind the Exchange by any such representations; that no estoppel can arise as between plaintiff's judgment debtor and the Exchange out of this transaction because the representations were not made to plaintiff's judgment debtor; that Helen Sondenaa, because of her marriage and residence at Toledo, Oregon, was not a "member" of the von Borstel family at Kent, Oregon, and that in any case the representations as understood by von Borstel were that the coverage would apply only to the brief period reasonably necessary for his daughter to sign the necessary papers on return to Toledo.

The second circumstance upon which plaintiff seeks to found an estoppel concerns various reports and in-

vestigations of the accident in relation to the time von Borstel paid the next premium. The accident happened on Sunday, October 3, 1948 (Tr. p. 101). It was first reported to the Exchange on October 16, 1948 (Tr. p. 133) in a letter from Elmer Sondenaa stating there was an accident involving Elmer H. Sondenaa as insured under policy 2098402 (Tr. p. 134). On investigation, the only Sondenaa of which the Exchange had any record as a policyholder, one E. G. Sondenaa of Toledo, was found to have dropped or cancelled his policy prior to 1945. Policy No. 2098402 was examined and found to cover a member named von Borstel residing some 250 miles from Toledo, in Kent (Tr. p. 135). The description of the car contained in Elmer H. Sondenaa's report did not agree in any particular with the car described in policy 2098402 (Tr. p. 102; compare Tr. pp. 57, 60). Under the circumstances, the Exchange paid no further attention to this report for the time being. Meanwhile, the regular semi-annual notice of premium due had been sent to von Borstel, who paid it on November 5, 1948 (Tr. p. 66). The Exchange deposited it on November 8 (Tr. p. 66). At a later date, information was given the Exchange which identified the policy on which claim was made as von Borstel's rather than that of E. G. Sondenaa.

It is plaintiff's contention that the Exchange's ac-

ceptance of this check, with knowledge of the facts of the accident, estopped the Exchange to deny coverage. It is defendant's contention that the sequence of dates clearly shows the Exchange was not aware of the facts of the accident at the time the premium check was accepted and that therefore no estoppel could arise.

The third circumstance relates to plaintiff's Exhibit 28, an official Oregon statement of financial responsibility referred to as Form SR-21. On that form the Exchange states that von Borstel was the registered owner and Elmer H. Sondenaa the operator of the car involved in the accident. The first of these statements was incorrect. It was incorrect because in Exhibit 14, dated November 13, von Borstel himself had informed the Exchange in writing that he was the registered owner, and this despite the fact that he had on July 25, 1948, endorsed over to his daughter the certificate of title to the car, (Tr. pp. 64, 89; Ex. No. 21). His action had been confirmed by the Secretary of State, who had issued the new title to Helen Sondenaa as owner on July 29, 1948 (Ex. No. 21). It is the plaintiff's contention that the filing of this form bearing statements indicating that the Exchange considered Elmer H. Sondenaa an additional insured under their contract with von Borstel operates to estop the Exchange from asserting the fact that there was no such coverage. It is defendant's contention that

this form was furnished upon the basis of false information given to the Exchange by their member and policyholder of record, Mr. von Borstel, just before the form was filed on November 17, 1948 (Tr. p. 86). No estoppel can be founded on acts induced by misrepresentations on the part of those claiming estoppel.

A further theory not embraced in the pleadings was suggested by the trial court (Tr. pp. 40, 176). This is to the effect that defendant's acceptance and retention of the November 5, 1948, premium payment constituted both an estoppel and a ratification of the prior representations. Plaintiff's position as to the effect of its acceptance has been noted above. With respect to retention of the premium payment by the Exchange, it is plaintiff's position that the Exchange thereby ratified all matters that eventually came to light. It is defendant's position that retention of a premium not initially received with knowledge of the facts has no such legal effect as the plaintiff contends; and that if it could have such an effect, one of the prerequisites to the establishment of plaintiff's contention would be a showing of demand for return of the premium. No such demand has at any time been made upon the Exchange.

The contentions here stated are presented on this appeal in several forms, viz., exceptions taken to the admission of evidence (Specifications of Error 1, 2 and

3), to the matters submitted by the trial court to the jury (Specifications of Error 4, 5, and 6), to the trial court's action in denying appellant's motion for a directed verdict and for judgment non obstante verdicto (Specifications of Error 7 and 8), and to the trial court's failure to give certain instructions requested by defendant below (Specifications of Error Nos. 9 through 17).

SPECIFICATIONS OF ERROR

A. Defendant specifies the following errors in the admission of evidence by the Court:

1.

The trial court erred in allowing Elmer Sondenaa to testify to what von Borstel said concerning what insurance salesman Lawrence had told von Borstel. The objection, ruling and matter erroneously admitted appear in the following passage, which is quoted from pages 88 and 89 of the transcript:

> "A. My father-in-law told my wife and myself that he had been to see Mr. Lawrence in The Dalles about the transfer of the insurance policy for the coverage on the car, so it would also be transferred with the ownership, and Mr. Lawrence had told—

Mr. Gearin: That is objected to. We object to this witness testifying to what Mr. von Borstel said to Mr. Lawrence.

The Court: Overruled. Go on. Tell your story.

A. Mr. Lawrence had told Mr. von Borstel that we would be covered since it was already in the family."

2.

The trial court erred in allowing the Sondenaas to testify to statements made to them by an investigator named Patterson. The objection, ruling and matter admitted set forth here are quoted from Elmer Sondenaa's testimony at pages 94 and 95 of the transcript and from Mrs. Sondenaa's testimony on page 115:

PP. 94-95:

"Q. Did Mr. Patterson have any further conversation with you in relation to defending you or protecting you on those claims?

Mr. Gearin: Objected to, your Honor, on the ground and for the reason that any statement made by Mr. Patterson after the accident could not possibly form a basis for estoppel, with regard to the transfer of the policy, and upon the further ground that it has not been shown that this man, Patterson, an adjuster, had any authority to make any admission which might be binding on the Exchange.

The Court: Answer.

Q. (By Mr. Pendergast): You may answer the question.

Mr. Gearin: May I make this objection general as to all statements and all testimony in regard to the statements of Patterson?

The Court: It is so understood.

A. Will you read the question, please?
(Question read).

A. Yes, he did. I objected to giving Mr. Patterson the correspondence I had received from those attorneys, and he said, inasmuch as the Farmers Insurance Exchange was representing me in the accident, it was my duty, as the insured, to turn over all correspondence to him." * * *

P. 115:

"Q. Did you give Mr. Patterson all the information he requested?

A. Yes * * *.

Q. He told you the Farmers Insurance Exchange was representing you in the accident?

A. He did."

3.

The trial court erred in allowing Helen Sondenaa to testify as to what her father, Mr. von Borstel, told her that Lawrence had told him. The objection, ruling and matter erroneously admitted are here quoted from pages 111 and 112 of the transcript:

"A. He told me he had seen Mr. Lawrence in The Dalles and Mr. Lawrence said—

The Court: Wait a minute.

Mr. Gearin: I will object to what Mr. Lawrence said, your honor, and object to this line of testimony. What Mr. von Borstel told this witness that Mr. Lawrence had said is hearsay.

The Court: Objection overruled. What did he tell you? Go ahead.

A. My father told me that Mr. Lawrence said I should have my signature affixed to the policy in the area in which I was living, but there was no rush for it because I was a member of the family and the policy was good."

B. The Court made the following errors in submitting the case to the jury:

4.

The trial court erred in failing to submit to the jury the question as to whether defendant accepted and retained a premium paid on or about November 8, 1948, with full knowledge of all the facts. The Court made the following statements in its charge, and the charge is in accordance with the statements here quoted:

"Ladies and Gentlemen, there are a number of questions in this case, but I am only going to submit one to you. * * * " (Tr. p. 171)

"It will be your function to decide the dispute as to

what was said at The Dalles between Lawrence and von Borstel. * * *" (Tr. p. 172)

"That is the only question I submit to you." (Tr. p. 173)

Objection was taken on page 177 in the following language:

"Mr. Young: In view of your Honor's suggestion to Counsel with reference to moving for a directed verdict and counsel's concurrence in so doing, the defendant then objects to that procedure upon the ground that there should have been submitted to the jury, as a question of fact, whether or not the defendant had full knowledge of the circumstances surrounding the ownership of the car at the time that it accepted the premium.

The Court: The objection is overruled.

Mr. Gearin: Or, the other way around, we object to the failure of the Court to submit that question to the jury.

The Court: Your co-Counsel just said that.

Mr. Gearin: I want to put it in another form.

The Court: Objection overruled."

5.

The Court erred in failing to submit to the jury defendant's version of a conversation between Mr. Lawrence and Mr. von Borstel, in addition to a version

based on plaintiff's evidence. The Court's version both in content and upon its face appears to have been taken from plaintiff's evidence alone. The Court said to the jury:

> "Von Borstel says that he went to Lawrence, the District Agent for these companies at The Dalles, and told him he was giving a Plymouth car to a married daughter who lived in Toledo, and he wanted to know what was necessary to make sure that the insurance on it was good after he gave her the car. That is a rough way of putting it.
>
> "He says that Lawrence, the agent, told him that his daughter should go to the company's agent down there in that country where she lived, and that she should 'sign the policy.' I don't know what that means, and that is one of the things you will have to figure out." (Tr. pp. 172, 173) * * *
>
> "If you do not believe that by a preponderance of the evidence, and that is if you don't believe von Borstel's version of it, then your verdict will be for the defendant." (Tr. p. 173)

Objection was taken (Tr. p. 175) to this omission in the following language, based on Lawrence's testimony (Tr. p. 121):

> "The defendant also objects to the failure of the Court to give the Lawrence version of the same conversation, which version was that Lawrence told von Borstel if his daughter took the car and he retained possession of title the car would then be insured in his name and the daughter would be additionally

insured; but, on the other hand, if title passed to the daughter, then the daughter would become a new applicant and would have to sign an application."

6.

The Court erred in submitting to the jury a version of the conversation between von Borstel and Lawrence which was not correct when measured by all the evidence, or even when measured by plaintiff's evidence alone. The version submitted was contained in the first two paragraphs quoted in specification of error No. 5 above, and will not be reiterated here. (See Tr. pp. 172, 173; compare Tr. pp. 63, 65.)

Objection was taken to this error in the following words:

"Mr. Young: At this time the defendant excepts—

The Court: Objects.

Mr. Young:—objects to your Honor's submission to the jury of the von Borstel version, in the particular that it was stated Mrs. Sondenaa, the daughter, would have to sign the policy. I think from the evidence in the case it would appear that the term meant was that they would have to sign an application." (Tr. p. 175)

C. The Court erred in ruling adversely upon defendant's motion for a directed verdict and for judgment notwithstanding verdict.

7.

The Court erred in denying plaintiff's motion for directed verdict. The grounds urged in support of this motion appear in the record at pages 164 through 170. In summary, these contentions were that Helen Sondenaa, the owner of the car, at all times from and after July 25, 1948, was not covered by the policy, both because of the terms of the insurance contract, which was one with Mr. von Borstel personally, and because of statutory provisions of Oregon law; that no attempted assignment was made nor was the consent of the Exchange procured to any such attempt, either by the means provided for in the policy, i.e., by endorsement, or in any other way; that assuming the Exchange could be bound by estoppel, essential elements of estoppel were not made out by the evidence and did not in fact exist; and even had they existed, they do not avail the Sondenaas, through whom the plaintiff claims, because the Sondenaas failed to use due or reasonable diligence or, indeed, any diligence at all to carry out the instructions which plaintiff contends were given to Mr. von Borstel. The full text of the grounds urged is set forth in Appendix A attached to this brief. For the Court's denial of the motion see Tr. p. 21.

8.

The Court erred in denying defendant's motion for judgment notwithstanding verdict. The grounds urged for this motion were the same as those urged in the motion for directed verdict. For a full statement of them see Appendix A hereto. The Court denied the motion in a separate order (Tr. pp. 19, 20).

D. The Court erred in failing to give any of the instructions hereafter set forth which were requested by defendant. Objections were taken to such failure. The instructions as given by the Court were found in Tr. pp. 171-174 and Appendix B hereto.

9.

The Court erred in failing to give the following instruction requested by defendant:

> "You are not to consider any controversy between the defendant Exchange and A. von Borstel."

10.

The Court erred in failing to give the following instruction requested by defendant:

> "Before there can be an estoppel in this case against the defendant, the plaintiff must first prove by a preponderance of the satisfactory evidence all of the following, which constitute elements of estoppel:

"(1) Agent Lawrence must have been authorized to make the statements which are claimed by the plaintiff.

(2) Agent Lawrence must have made a false representation or concealment of material facts.

(3) Agent Lawrence must have made the representation or statements with actual or constructive knowledge of the true facts.

(4) The party to whom the statements were made, that is, the assured A. von Borstel must have been without knowledge or means of knowing the true facts.

(5) Agent Lawrence must have made the statements with the intention that the statements be relied upon and the party to whom the statements were made, that is the assured. A. von Borstel must have relied upon the statements of Agent Lawrence to his prejudice."

11.

The Court erred in failing to give the following instruction requested by defendant:

"If you find from the evidence in this case that no representation was made by the defendant to Helen L. Sondenaa, then an essential element of estoppel would be lacking and your verdict would have to be for the defendent."

12.

The Court erred in failing to give the following instruction requested by defendant:

"A. There can be no estoppel where the conduct of the person asserting the estoppel is the result of such person's fault or negligence.

"B. In other words, if the failure on the part of Helen L. Sondenaa to have the policy formally assigned to her was the result of her own fault or negligence rather than the statements made by Agent Lawrence, then in that event you must find your verdict in favor of defendant."

13.

The Court erred in failing to give the following instruction requested by defendant:

"You are instructed that if under the circumstances of this case a reasonably prudent person would have made further inquiry as to the location and identity of an agent of the Exchange, and would have had the policy formally assigned within a reasonable period of time after the transfer of title, and you further find that Helen L. Sondenaa did not act as such reasonably prudent person would have acted, then in that event the plaintiff can not recover and your verdict would have to be in favor of the defendant."

14.

The Court erred in failing to give the following instruction requested by defendant:

"Before you can find that the Exchange was

estopped to deny that the policy was transferred to Helen L. Sondenaa based upon the retention of the premium paid by A. Von Borstel after the accident, there must appear from the satisfactory evidence that the Exchange knew of the transfer of title prior to the time the premiums were received."

15.

The Court erred in failing to give the following instruction requested by defendant:

"A The party setting up estoppel must have acted in reliance on the conduct or the representations of defendant. Helen L. Sondenaa must have had knowledge of the conduct or representations and must not only have been destitute of knowledge of the validity of the assignment without the consent of the defendant endorsed upon the policy but must also have been without convenient or ready means of acquiring knowledge of the validity of the assignment without the company's consent endorsed upon the policy. (To the Court: See American Bank v. Port Orford Cedar Products Co., 140 Ore. 138, 12 P. (2d) 1014.)

"B. A party relying upon an estoppel must exercise reasonable diligence to acquire knowledge of the facts and if a party conducts himself with careless indifference to means of information reasonably at hand, the doctrine of estoppel can not be invoked.

"C. You are instructed in this connection that one of the provisions written on the face of the insurance policy required an endorsement of the consent of the defendant on the policy before the assignment of any interest under that policy would be valid."

16.

The Court erred in failing to give the following instruction requested by defendant:

"A. Under the terms of 7 O.C.L.A., Sections 101-1301 to 101-1316, inclusive, which sections regulate reciprocal insurance in the State of Oregon, there can be no contract of insurance until such time as the applicant for insurance has become a subscriber to the Exchange.

"B. You are instructed that under these circumstances Helen L. Sondenaa could not have become an insured of defendant Farmers Insurance Exchange until after she became a member of the defendant reciprocal exchange.

"C. Since Helen L. Sondenaa never became a member of the defendant's Exchange, she was not the insured under this policy of insurance and defendant is therefore not liable for any judgment obtained against her husband."

17.

The Court erred in failing to give the following instruction requested by defendant:

"If you find that A. von Borstel misunderstood the statements of Agent Lawrence, then in that event the plaintiff can not recover in this case."

SUMMARY OF ARGUMENT

I.

A. The trial court committed prejudicial error in admitting certain hearsay testimony.

B. The trial court committed prejudicial error in giving the jury a one-sided summary of the evidence in its charge.

II.

A. The Sondenaas were not covered under von Borstel's policy. Plaintiff therefore claims coverage upon the theory of estoppel.

B. As a matter of law, plaintiff failed to make out an estoppel arising out of the conversation between von Borstel and Lawrence.

C. In addition to the fact that as to this conversation the plaintiff has not made out the elements of estoppel, there is a further objection that as a matter of law William Lawrence, district agent for Farmers Insurance Exchange who made the representations relied upon by plaintiff, had no authority to extend the coverage of the policy, and no act of the Exchange invested him with apparent authority for that purpose.

D. Plaintiff similarly failed to make out an estoppel

arising out of defendant's receipt of von Borstel's premium check dated November 5, 1948.

E. Plaintiff failed to make out an estoppel with respect to the Form SR-21.

F. Defendant's retention of the November premium, no demand having been made for its return, failed to meet the requirements of estoppel.

III.

Since plaintiff failed to make out the elements constituting estoppel as to any of the acts or representations of the defendant, or its agents, on which he relied in his pleadings, or the court relied in its memorandum opinion, as a matter of law plaintiff's case fails. In this state of facts, a Federal Court is required to direct a verdict for the defendant or take other appropriate procedural means to withdraw the entire case from the jury. The trial court here erred in failing so to do.

ARGUMENT

I.

Certain serious errors were committed affecting that phase of the case which was submitted to the jury.

A. The trial court erred, to the prejudice of the de-

fendant, in admitting testimony of Elmer and Helen Sondenaa as to what von Borstel told them Lawrence had said to him.

Von Borstel had already testified to this conversation himself (Tr. pp. 63, 65). Testimony of the Sondenaas as to the substance of that conversation, at which they were concededly not present, is plainly hearsay.

Moreover, this was not merely cumulative testimony, for both Elmer's and Mrs. Sondenaa's versions were stronger against defendant than was von Borstel's version. Compare his testimony at pp. 63 and 65 of the transcript with that of Elmer at page 89 and Mrs. Sondenaa at page 112. In both of these passages an absolute assurance of coverage is attributed to Lawrence; whereas in von Borstel's words, there are important qualifications expressed.

B. The preceding errors were rendered more serious by the trial court's error in giving a one-sided commentary on the evidence relating to this conversation—an error which, it is submitted, requires reversal.

Sperber v. Conn. Mutual Life Ins. Co., C.A. 8, 1944, 140 F. (2d) 2, cert. den. 321 U. S. 798, 88 L. Ed. 1087, 64 S. Ct. 939;

McGlothan v. Penn. R. Co., C.A. 3, 1948, 170 F. (2d) 121, 125;

Virginian Ry. Co. v. Armentrout, C.A. 4, 1948, 166 F. (2d) 400, 4 A.L.R. (2) 1064; and

cf. *Lever Bros. Co. v. Atlas Assur. Co.*, C.A. 7, 1942, 131 F. (2d) 770, 778.

The Court's language appears on pages 172 and 173 of the transcript, and in Appendix B hereto. An inspection will reveal that the version charged omits two conditions on the continuation of protection by the policy which were still clear in von Borstel's mind at the time of trial. These are the necessity—not merely the desirability—of seeing an agent in order to get the policy signed, and the need for doing so promptly which is indicated in his phrase "at her first convenience" on page 65. Lawrence's version is not given; nor is the jury even reminded that he, too, had testified as to that conversation.

This is not that fair and balanced comment on the evidence which within the rule of the *Sperber* case, supra, is permitted a federal judge.

In the *Sperber* case, the plaintiff brought actions (consolidated for trial) on the disability clauses of policies with two companies, asserting that amputation of one arm had totally disabled him from following his occupation as hairdresser. Both applications were in evidence. In charging the jury, the court read aloud state-

ments from one in which Sperber had described himself as "proprietor of Sperber's Hair Shop" with duties which were "executive and a small amount of cosmetology," but declined, even after request, to read the other, in which the corresponding entries were "hairdresser" and "owner and operator hairdressing shop."

The 8th Circuit sent the case back for a new trial, saying:

> "The problem here is not that of a judge commenting upon or stating an opinion about the evidence. The situation is that the Court in summarizing an important aspect of the evidence—statements by appellant in these and other applications for insurance —outlined the evidence favoring appellees and, when requested to cover the same aspect where favorable to appellant, omitted to do so. * * *
>
> "We think this part of this charge was thus prejudicial."

This language was quoted with approval and the case followed by the Third Circuit in *McGlotham v. Penn.* RR., supra. The *Armentrout* case is in accord. The *Lever Bros.* case is cited for contrast as an illustration of the general principle which the court there states. "The court should not take sides in its comment upon the evidence; and the court most certainly did not in the case at bar."

In the light of the *Sperber* case, the court's one-sided summary in its charge is reversible error—particularly so when reinforced, as it was, by prejudicial error in the admission of testimony.

II.

A. The remaining issues in the case were decided by the court. They depend upon the legal effect to be given to various actions and communications between the Sondenaas and von Borstel, on the one hand, and the Exchange and its various agents on the other. At the outset it is to be noted that by the plain terms of the policy its coverage was limited to liability arising from the ownership, maintenance or use of the car described therein and did not extend beyond the period of its ownership by the named insured, von Borstel.

> "Coverage A—To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."
>
> —(Insuring Agreement I of Policy, Exh. 4)
>
> "This policy does not apply:—
>
> "(d) Under coverages A and B, to any liability

assumed by the insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the Exchange."

—(Exclusion (d) of Policy, Exh. 4)

The Sondenaas thus had, and have, no claim on or through the policy itself upon the Exchange.

The theory on which the Sondenaas claim the Exchange is bound to assume their liability is one not explicitly stated in the proceedings. It is that there was an assignment of the policy to Mrs. Sondenaa; and that although this assignment was not made by any method recognized in the policy or in the rules of the Exchange appearing in its manual filed with the Insurance Commissioner, by which the Exchange was bound, nonetheless the Exchange cannot assert that this assignment is invalid by reason of estoppel. The alleged estoppel is based on a conversation between von Borstel and agent Lawrence, at a time when von Borstel was still the owner of the car, apparently on the theory that von Borstel was agent for the Sondenaas in this respect. Estoppel is also asserted with respect to certain transactions occurring after the accident, in particular the acceptance and retention of a premium and the filing

of a document described as Form SR-21. The case thus turns on the Oregon law of estoppel.

We submit that the trial court incorrectly applied the law of estoppel to facts not seriously in dispute in reaching the conclusion embodied in his memorandum opinion and judgment. Although no express findings of fact or conclusions of law were made, the trial court's ultimate decision necessarily implies preliminary findings that certain representations were made in each of the three instances referred to above, that these representations were incorrect, and should reasonably have been known by the maker to be incorrect; that they were made to persons ignorant of the truth, who were without ready means of ascertaining the truth; and that they were relied upon to the prejudice of these persons. Upon the record herein such findings could not properly have been made.

The court will note that the Specifications of Errors 9 through 17 assert as error the omission of instructions which did not relate to the narrow issue actually submitted to the jury. The issues to which these instructions referred were decided by the trial court itself, and in opposition to the Oregon decisions hereinafter cited which those instructions correctly summarized.

The remaining assignments of error relate to the

trial court's decision on motion for directed verdict and on motion for judgment notwithstanding verdict. These motions were made on essentially the same grounds and raise essentially the same issues. They are argued together according to the outline given above.

B. The law of Oregon relating to estoppel is that a party asserting estoppel must show that representations were made by the party against whom estoppel is asserted; that these representations were incorrect, and that the person making them should reasonably have known them to be so; that such representations were made to persons ignorant of the truth and without ready means of ascertaining it; and that such persons relied upon these representations to their prejudice.

Bramwell v. Rowland, 123 Ore. 33, 46-49, 261 Pac. 57;

Myers v. Olds, 121 Ore. 249, 252 Pac. 842;

Scott v. Hubbard, 67 Ore. 498, 136 Pac. 653;

Oregon v. Portland General Elec. Co., 52 Ore. 502, 528, 95 Pac. 722, 98 Pac. 160.

The first incident to which the above principles are to be applied is a conversation held between von Borstel and Lawrence in The Dalles toward the end of June, 1948. What was stated in that interview was the sub-

ject of some dispute between the parties. The version most favorable to the plaintiff, which version the jury's verdict requires us to accept on this argument, may be summarized from von Borstel's direct testimony on pages 63 and 65 of the transcript in the following language:

> In order to transfer the policy from von Borstel to his daughter it would be necessary for the daughter to sign the policy. This would have to be done at her first convenience, with Lawrence or her nearest representative at Toledo. In the meantime, this being a transaction within the family, as long as the premiums were paid on the policy, it would cover them.

The issue submitted to the jury was which version should be believed (Tr. pp. 172, 173), and their verdict shows that it was von Borstel's version they chose. The Court could not reasonably have found von Borstel's version to be other than von Borstel himself stated it.

The Court, in deciding against the defendant, must have determined that these representations were made, that they were incorrect, and that Lawrence reasonably should have known them to be correct. The next element, that they were made to one ignorant of the truth and without means of readily ascertaining it, the Court could not properly have found in plaintiff's favor.

It is Oregon law that a party asserting estoppel in

his favor "must show that he exercised good faith and due diligence in endeavoring to ascertain the truth." Here it affirmatively appears that the Sondenaas and von Borstel did not use the required due diligence, and had ready means of ascertaining the truth, which they did not use.

That the law of Oregon is as above stated, and as stated in Specifications of Error 13 and 15, see *Myers v. Olds*, supra, from which the words in quotation marks above are taken; *Bartnik v. Mutual Life Insurance Company of New York*, 1936, 154 Ore. 446, 60 P. (2d) 943, and *American Bank v. Port Orford Cedar Products Co.*, 140 Ore. 138, 144, 12 P. (2d) 1014. See also *State v. School District No. 9*, 148 Ore. 273, 288, 31 P. (2d) 751, 36 P. (2d) 179, and *Branwell v. Rowland*, 123 Ore. 33, 261 Pac. 57.

Both Elmer and Helen Sondenaa had read the policy after obtaining the car and before the accident (Tr. pp. 107, 118). Von Borstel had it in his possession for ten years and had twice before had changes made in its coverage in the usual fashion by requesting and receiving an appropriate endorsement from the Exchange (Tr. pp. 79, 80; Ex. 4). They all must be held to know what they read, for Ex. 4 is in intelligible English. That policy requires the consent in writing of the Exchange to any transfer of interest before the Exchange shall be

thereby bound (see Condition 18 of Ex. 4, entitled "Assignment").

Moreover, even in von Borstel's version of Lawrence's instructions to him (Tr. pp. 63, 65) and in the version of Elmer Sondenaa (Tr. pp. 106, 108) and Helen Sondenaa (Tr. pp. 116, 117) as to what von Borstel told them, it is clear that they all understood that Lawrence told them to see a representative of the Exchange and get the policy assigned.

The agents they were to see were readily accessible. Judge Gilkey lived in Newport, some nine miles away from the Sondenaa's home, and was listed in the telephone book which the Sondenaas had (Tr. p. 103). There was also an agent at Corvallis who was listed in the directory. Both these entries appear under the heading of "Farmers Insurance" or "Farmers Inter-Insurance Exchange." (See Exs. 10 and 11.)

And yet the Sondenaas did nothing to comply with the conditions of the policy which they had read or with the instructions which they understood Mr. Lawrence to have given. As Elmer Sondenaa put it (Tr. p. 108): "We looked for an agent, half-heartedly." This is not the due diligence required by Oregon law of a party asserting estoppel. It is rather more like gross neglect of a known condition for the obtaining of protection.

The facts being as above, the trial court could not, as a matter of law, have found that the Exchange was estopped to assert lack of coverage by these events happening before the accident of October 3, 1948.

C. William Lawrence, with whom von Borstel conversed, had no actual authority to extend the coverage of the policy in any manner whatsoever; and no acts of the defendant are shown which cloaked him with apparent authority to that purpose. Moreover, the power to bind the company to an extension of coverage is one which can be supported only by actual authority in the agent.

Aetna Casualty & Surety Co. v. Block, Texas, 1942, 142 S.W. (2d) 445, reversed on other grounds in 138 Texas 420, 159 S.W. (2d) 470.

Carnes & Co. v. Employers Liability Assurance Corp., CA 5, 101 F.(2d) 739.

Standard Insurance Co. v. Roberts, CA 8, 1942, 132 F.(2d) 794.

Fidelity & Guaranty Fire Corp. v. Bilquist, CA 9, 1938, 99 F.(2d) 333.

Craswell v. Biggs, 160 Ore. 547, 86 P. (2d) 71.

Bartnik v. Mutual Life Ins. Co. of N. Y., 154 Ore. 446, 60 P. (2d) 943.

45 C.J.S. 631, Insurance, §683.

As pointed out above, the policy coverage was stated in the policy not to extend to acts occurring after the transfer during the policy period of the interest of the named insured, von Borstel, in the automobile.

In the *Aetna* case, supra, an employer had Workmen's Compensation insurance in force for employees of his drygoods store. He later went into the junk business, for which the premiums were much higher. He inquired of the local agent of the insurer and was told his policy covered those of his employees engaged in the junk business. It was held on appeal that a verdict should have been directed for the defendant insurance carrier. The ground of the decision was the same as that now urged in the present case—viz: an agent not expressly thereto authorized has no power to extend the coverage of a policy.

A similar holding is in the *Carnes* case, supra. The liability policy on which suit was there brought covered a truck "handling farm machinery, crane fixtures and paint." After the policy was written, the plaintiff began to use the truck regularly for hauling Butane, a volatile and explosive fuel. This use of the truck, according to the undisputed evidence, was known to the local agents over a long period of time and at the time a renewal policy had been issued. Nonetheless, when a tank of Butane exploded and did considerable damage

the Fifth Circuit held that the risk out of which the loss arose was not within the policy coverage and that neither waiver nor estoppel availed the plaintiff to bring himself within the limits of the policy, stating that these doctrines are available "only to relieve as against the consequences of violation of the terms of a policy and not to extend its coverage." The principle here stated has been recognized in the other cases above cited.

Oregon law is in accord with the above Federal cases. In *Craswell v. Biggs*, supra, the plaintiffs were trying to recover upon a surety bond on which one of their subcontractors was principal and the Aetna Casualty & Surety Company was surety. The contractor and the subcontractor had together called on the defendant insurance company's general agent, a resident Vice-President, to ascertain from him whether an additional surety bond would be needed to cover an additional section of the principal contract which had been awarded to the subcontractor. After thorough discussion and deliberation the general agent had informed them that the existing bond would protect them on the additional work contemplated. The Court's holding was that even so strong a state of facts as this did not change the rule that an agent, without express authority, cannot extend the coverage of an existing policy.

Insurance solicitors are agents of limited authority,

as was the case with Lawrence. It is generally held that in the absence of positive action, or negligent inaction on its part, the insurer is not bound by acts or representations of its soliciting agents, however clearly made. See 45 C.J.S. 631, Insurance, Sec. 683. This rule applies in Oregon, as the *Bartnik* case, supra, sufficiently indicates.

It is plain, therefore, that Lawrence had no authority to extend the coverage of this policy in the fashion contended for by the plaintiffs. The plaintiff's case therefore must fail insofar as it rests upon Lawrence's conversation with von Borstel.

D. The plaintiff asserts that defendant's acceptance of a premium paid on November 5 and cashed on November 8 estops the Exchange from asserting the fact of noncoverage. Let us apply the Oregon law of estoppel to this assertion.

The only representation that can conceivably be derived from an acceptance of this premium is one that no grounds for asserting cessation of the policy coverage existed at that time. If it be assumed that such representation was in effect made by the acceptance of this premium, it may likewise be assumed that such representation was incorrect. However, an analysis of the facts as set forth in the testimony shows conclusively

that there was no way the Exchange could have known that the car described in the policy was no longer owned by von Borstel. In the absence of such knowledge, or any notice to that effect, an essential element of estoppel is missing. The Court could not properly have found as a matter of law that this element of knowledge existed.

The facts, which are substantially undisputed, are as follows: On October 5, two days after the accident, Elmer Sondenaa sent a letter to George Moon, former agent of the Exchange in Wasco (Ex. 15). On October 8, according to Exhibit 22, William Lawrence received this letter, was unable to find any record of any such policyholder in his file, and forwarded it to the Exchange. On October 11 (Tr. p. 133) the Exchange received Elmer's letter. This was the first intimation from which notice of the accident could be derived. Part of the text of Exhibit 15 is given at pages 101 and 102 of the transcript; reference to it will show that it was addressed from Toledo, Oregon. On checking the name in their master files, the Exchange found only that a former policyholder, E. G. Sondenaa, had once resided at Toledo, but had dropped or cancelled his policy some years before (Tr. p. 134). On checking by the number given in Elmer's letter, they examined the file on von Borstel's policy and found that it was not on a 1937 Chevrolet (Ex. 15) but on a 1940 Plymouth (Ex. 4)

that the owner's name was von Borstel and not Sondenaa, that he lived at Kent, in Eastern Oregon, and not at Toledo, on the Coast; and nothing in the file gave any indication that von Borstel was no longer the owner (Tr. p. 135), for he had never notified the Exchange to such effect. Some weeks later their conclusions were apparently confirmed by von Borstel's payment of his premium by check dated November 5 and cashed by the Exchange on November 8. (Tr. p. 66; Ex. 5)

Summarizing events to this point, it cannot be reasonably concluded that the Exchange had received any notice or knowledge of the transfer of the car at the time it received and cashed the premium check.

At said time, the Sondenaas were, of course, aware of all the details pertaining to the accident and to the transfer of ownership of the car, and were aware that they had not taken the action which Lawrence had directed them to do (Tr. pp. 107, 108; testimony of Helen Sondenaa, pp. 112, 117). Von Borstel was aware that the accident had occurred (Tr. p. 65) and that the title had been transferred (Ex. 21). The Court could not reasonably have found anything but that these three persons were fully aware of the truth.

Some prejudice to the parties asserting estoppel as the result of their reliance upon representations must

be shown. It does not appear that the Sondenaas were in any way prejudiced by the company's acceptance of this premium.

Bramwell v. Rowland, *supra*, at pp. 46-7 of 123 Oregon.

Whatever liability the accident of October 3, 1948 might result in for the Sondenaas was a matter as to which the payment of this premium made no different whatsoever. Whether it had or had not been paid, would not have affected the Sondenaas' position in any way. No showing is made in the record that the continuation for a few weeks longer of their expectancy that Farmers Exchange might take care of their liability operated to their prejudice.

On this aspect of the case, the Court could not as a matter of law have found the existence of three at least of the elements essential to a finding that the Exchange's acceptance of the premium paid on November 5 estopped the Exchange from asserting the fact of non-coverage as against the Sondenaas.

E. The contention is also made that the filing of form SR-21, Statement of Financial Responsibility (Ex. 28) operated to estop the Exchange from asserting non-liability.

This statement was an express representation that

von Borstel was the policyholder and insured, that Elmer Sondenaa was the driver, and that the policy furnished coverage to them both under its terms.

That the policy by its terms did not in fact cover either von Borstel or Elmer Sondenaa is undisputed. The Court could not have reasonably found as a fact, however, that the Exchange should then have known that no coverage existed.

The facts that appear from the testimony as to the date and time of information obtained by the Exchange again become significant. On November 10th, or possibly the 9th, a telephone call from attorney Nathan Weinstein, presently of counsel for plaintiff, and therefore not an agent for the Sondenaas, first advised the Exchange that the car involved was a 1940 Plymouth with the same identifying numbers as that described in von Borstel's policy (Tr. p. 138). The Exchange immediately proceeded to investigate. On November 10, an ownership statement was taken from Elmer Sondenaa (Ex. 12, Tr. 144). On November 13, an accident report was given by von Borstel to an adjuster for the Exchange (Ex. 14). The first of these said that Mrs. Sondenaa was the owner; the second said that von Borstel was. The second came from the policyholder of record. Mr. Weinstein's letter of November 15 (Ex. 20) says nothing about the title. On November 17, the 45th

day after the accident, the last day on which the law relating to financial responsibility could be complied with so as to protect their policy-holder, von Borstel, from revocation of his license, a Form SR-21 was filed describing the car as being owned by von Borstel as registered owner, but driven by Elmer Sondenaa. On November 18, an ownership statement was obtained from Mrs. Sondenaa (Ex. 16).

Failure to file Form SR-21 would have resulted in the consequences set forth in O.C.L.A. Sec. 115-416, which allows a period of 45 days only in which to file such form. If the form had not been filed on time, not only Elmer Sondenaa's license, but also the registration and plates on both von Borstel's automobile and on his truck could have been suspended,—a very serious matter for a farmer. For the protection of their policy-holder, they had to get that notice in on time.

It appears from an inspection of the sequences of dates above, that the information the Exchange had did not enable it to determine with certainty that von Borstel was no longer the registered owner. Von Borstel's own statement on November 13 describes himself as being the registered owner. In the face of this express representation from their policyholder of record, the Exchange had no choice but to consider him still the owner of the vehicle and itself still liable under the in-

surance contract with him to protect him throughout in proceedings relating to the accident.

The trial court could not have reasonably found that the Sondenaas were unaware of the true facts relating to the transfer and present ownership of the car at the time this form was filed. For documentation the Court is respectfully referred to the discussion of the same point in relation to the effect of acceptance of the premium, supra.

The Court could not have reasonably found that the Sondenaas relied upon the representation contained in Form SR-21. *Bramwell v. Rowland*, *supra*, at pp. 46-7 of 123 Ore.

In the first place, it does not appear that either of the Sondenaas ever knew this form had been filed. In the second place, the argument made in the previous section of this brief in relation to acceptance of the premium is again applicable: even had they known this was filed, their liability was already fixed in degree, although undetermined, and no action by the company in filing this form could have increased or diminished it. No recourse to other insurers at that time would have lightened their risk. No action had been begun at that time and they had no pressing need of attorneys. When action was begun, a notice to them from the Exchange was already in the mail; it stated that, after deliberation,

they had at last determined the true state of facts, namely, that coverage under the policy had ended at the time of the transfer of ownership in July, 1948, three months before the accident.

Therefore, as matter of law, the Court could not have found that the Exchange was estopped by the filing of form SR-21 from asserting the fact of non-coverage.

F. Retention of the premium paid on November 5, a date prior to defendant's receipt of any knowledge or notice that its policyholder had transferred the policy to the Sondenaas, does not estop it to assert the Sondenaas were not covered.

Peterson v. Universal Auto Ins. Company, 53 Ida. 11, 20 P. (2d) 1016;

Commercial Standard Insurance Co. v. Robertson, C.A. 6, 1947, 159 F. (2d) 405, 408;

Goorberg v. Western Assurance Company, 150 Calif. 510, 89 Pac. 130, 10 L.R.A. (N.S.), 876.

25 L.R.A. (N.S.) 3,

51 L.R.A. (N.S.) 261,

45 C.J.S. 690, Insurance, Sec. 716 et seq.

The first of the cases above cited is a holding precisely contrary to the position taken by the trial court in the instant case. The *Peterson* case grew out of an accident which occurred a day or so after the car originally covered by the policy had been sold to a condi-

tional vendee. The latter was using the car for his own purposes and in his own right at the time of the accident. The policy contained a provision for termination if there should be any change in the ownership or interest of the named assured in the policy or in the automobile insured thereunder. As in the present case, the insurer first learned of the breach of condition when the loss was reported some time after both the transfer and the accident. After considering its possible liability, the insurer defendant cancelled the policy as of a date two and a half months following the accident, and retained the premium for that period.

Upon trial, a judgment of non-suit against the plaintiff was rendered. Upon appeal the Idaho Supreme Court affirmed the judgment, holding that the fact that the insurance company retained the premiums and did not cancel for some months after the accident in no way prejudiced the assured. In the Court's view, *the rights of the parties were fixed at the time of the loss.* See the discussion in 20 P. (2d) beginning at page 1020, in which additional authorities are cited. To the same effect, see *Commercial Standard Insurance Co. v. Robertson*, C.A. 6, 1947, 159 F. (2d) 405, 408; see also *Goorberg v. Western Assurance Company*, 150 Calif. 510, 89 Pac. 130, 10 L.R.A. (N.S.) 876, cited with approval in the *Peterson* case, in which the Court in part said:

"The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or non-action of the insurer after the loss, it is essential 'that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his actions.' "

This view is fully supported by the cases cited in the notes at 25 L.R.A. (N.S.) 3 and 51 L.R.A. (N.S.) 261. To the same effect, see 45 C.J.S. 690, Insurance Sec. 716 et seq.

In the light of the above authorities, the trial court erred as matter of law in finding that defendant was estopped by its retention of premium to assert non-coverage.

III.

Since, as matter of law, defendant Exchange could not have been estopped upon the evidence adduced by the plaintiff as to the conversation between von Borstel and Lawrence, the time of acceptance of the premium, the filing of the Form SR-21, or the retention of the

premium, the trial court should have directed a verdict for the defendant, or granted defendant's motion for judgment notwithstanding the verdict.

The plaintiff's case rested upon the theory that acts of the defendant and its agents had misled the Sondenaas to their prejudice. It has been shown above that the Sondenaas were not justified in relying on what von Borstel told them Lawrence said to him, and that they were not prejudiced by the other three incidents adduced by plaintiff, since they all occurred after the accident, when rights of the parties were fixed, and resulted in no change of position on the part of the Sondenaas. Under these circumstances plaintiff has failed to make out her case.

A Federal Court is required, when a case has plainly failed of proof, to take the matter from the jury by direction of a verdict or other appropriate procedure. See *Brady v. Southern Ry. Co.*, 1943, 320 U.S. 476, 88 L. Ed. 239, 64 S. Ct. 232, in which the Court overruled the contentions of appellant that the court below had usurped the functions of the jury in concluding as a matter of law that there was no probative evidence of actionable negligence on the part of defendant. In this connection the Court said (page 243 of L. Ed.):

> "When the evidence is such that without weighing the credibility of the witnessses there can be but one

> reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

See also cases there cited. This decision of the Supreme Court is binding upon a Federal District Court. In view of the fact that the elements of plaintiff's case failed of proof, as pointed out above, the trial court should have directed a verdict for defendant, or failing that, should have granted defendant's motion for judgment notwithstanding verdict.

IV—CONCLUSION

In summary, defendant Farmers Insurance Exchange asserts that it is not obligated to the plaintiff's judgment debtor, and therefore not to the plaintiff. Its position is this:

It was bound by contract with Mr. von Borstel to assume liability for damages incurred by him or by persons using the car with his consent as a result of accidents involving the car, so long as he owned it. At the time of the accident from which this suit arose, he no

longer owned it. The risk was therefore not one covered by the contract, and the Exchange is accordingly not liable for consequences of that accident. As shown in the preceding pages, the plaintiff has failed to establish facts sufficient in law to estop the Exchange from asserting as a complete defense to this suit this fact of non-coverage.

Respectfully submitted,

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APPENDIX A

GROUNDS OF DEFENDANT'S MOTIONS

Mr. Young: At this time, your Honor, the defendant moves the Court for an order directing a verdict against the plaintiff and in favor of the defendant for the following reasons:

In the first place, under the "Insuring Agreements," Agreement I, Coverage A, the Exchange agrees "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * because of bodily injury * * *"

Under Insuring Agreement III, "The unqualified word 'insured' wherever used in Coverage A * * * includes not only the named insured but also any person while using the automobile and any person * * * legally responsible for the use thereof, provided that the declared and actual use of the automobile * * * is with the permission of the named insured."

It appears, without dispute, from the evidence that the insured, A. von Borstel, on June 29, 1948, trans-

ferred his Certificate of Title to the 1940 Plymouth to his daughter Helen Sondenaa.

Accordingly, on October 3, 1948, when the accident occurred, von Borstel was not the owner of the car and, therefore, not the insured under the policy.

Moreover, having transferred title to the car to his daughter, von Borstel no longer had the capacity to permit his daughter or anyone else to use the car. Helen Sondenaa, therefore was not an additional insured under the policy.

In the second place, as the owner of the 1940 Plymouth by transfer from her father, Helen Sondenaa acquired no rights under the policy.

Condition (17) titled "Changes" reads: "No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Exchange from asserting any rights under the terms of this policy * * *"

Condition (18) titled "Assignment" reads: "No assignment of interest under this policy shall bind the Exchange until its consent is endorsed hereon * * *"

Within the meaning of these two provisions of the policy, the transfer of title to Helen Sondenaa from von Borstel of the 1940 Plymouth automobile, not having

been consented to by the Exchange, through endorsement on the policy, made the transfer of the policy to Helen ineffective.

In the third place, your Honor, Title 101, Chapter 13, O.C.L.A., relating to reciprocal insurance, provides for a form of insurance through the exchange of insurance contracts by members of the organization provided for in the Act. It also provides that insurance contracts may be executed for subscribers by an attorney duly authorized and acting for such subscribers. I refer in this regard to Section 103-1302, O.C.L.A.

Helen Sondenaa was not a member of the Insurance Exchange and, therefore, not eligible for insurance protection.

In the fourth place, your Honor, the insuring agreements and conditions of the policy provide, among other things, that the Exchange agrees with the insured, "named in the Declarations, made a part hereof, in consideration of the payment of the membership fee" and the execution of a power of attorney to the Farmers Underwriters Association, to protect the insured in a certain manner.

There is neither pleading nor proof that Helen Sondenaa ever paid such a membership fee or executed such a power of attorney. Therefore, by the terms of the

policy she could not be entitled to insurance protection.

Fifth, your Honor, the policy of insurance involved herein is an executory contract, in connection with which the personal character of the insured is an important element and, therefore, as a matter of law, not assignable without consent of the parties. Her purported assignment occurred before the accident took place The consent of the Exchange not having been obtained, the purported assignment was ineffectual. That this policy of insurance involves the personal character of the insured appears definitely from Exhibit 23 which has just been introduced in evidence.

In the sixth place, the alleged statement by District Agent Lawrence of the Exchange, that the policy would have to be "signed by the daughter, but that since the premium was paid and the transaction remained in the family the policy would cover Helen Sondenaa," does not estop the Exchange from asserting non-liability under the policy.

To begin with, there has been no showing whatever in this case that the District Agent had any authority to make such statements, if in fact they were made, or to bind the Exchange by such statements.

Condition (17) of the policy expressly states that the terms of the policy may not be changed or varied

"except by endorsement issued to form a part hereof, signed for Farmers Automobile Inter Insurance Exchange, by an executive officer of its attorney-in-fact, the Farmers Underwriters Association."

Moreover, as appears without contradiction from the testimony of Mr. Smith, the last witness on the stand, the Manual of the Exchange and the rules and regulations bind these agents, and these agents are not at liberty to alter or change the Manual or the rules and regulations in any regard.

Moreover, your Honor, the purported statement, if it was made at all to von Borstel, was to the effect that the policy would have to be "signed" by the daughter, and that failure by the daughter to sign would render the policy ineffective.

Again, the transaction was not one remaining in the family, in the sense of the family living under one roof, because the von Borstel and Sondenaa families were separate and distinct families, living at remotely located geographical points, the distance between them some 250 miles.

Furthermore, the representations made by Mr. Lawrence were made to von Borstel and not to Helen Sondenaa, and he is the only one who could complain in respect to any representations made, and he has not complained and is not complaining.

Again, there were no representations made in this case to the plaintiff, Louise K. Holm, and she at no time ever acted or relied upon any statement whatsoever made by Mr. Lawrence.

Still again, the provisions of the policy relating to assignment of interest and lack of power in general to change the terms were known to or should have been known to von Borstel, for he had the identical policy in his possession for ten years prior to the transfer of this automobile and, moreover, he knew from his experience in 1940, when he exchanged his earlier Plymouth automobile for the 1940 Plymouth automobile, that instructions to change the policy had definitely been given by him to the Exchange.

In that regard, your Honor, I call your attention to the policy of insurance which is before the Court, and which contains a rider issued to Mr. von Borstel on the 11th day of May, 1942, by the Farmers, wherein it states in so many words that "In accordance with your instructions, coverage on your policy is transferred by this endorsement to cover the car described below instead of as heretofore."

In addition, your Honor, von Borstel had all reasonable opportunity to learn the facts and obviously made no effort whatsoever to do so.

Finally, Helen and Elmer Sondenaa——

The Court: Where are you reading all that from?

Mr. Young: These are some memoranda I prepared. The subject is a little technical and I did not wish to rely on my memory.

The Court: You do not have all that on one page?

Mr. Young: No, your Honor. I have several pages here. Finally, Helen Sondenaa——

The Court: This is the longest motion for a directed verdict I ever heard.

Mr. Young: I always like to break the record, your Honor, if possible. This apparently may be one of those instances, although I thought perhaps by stating this matter in considerable detail your Honor would have before you, in succinct form, all the points we have in mind, to the end that the record will be complete, and your Honor can have before you full opportunity to give consideration to these matters.

The last point I have in mind in this connection is that both Helen and Elmer Sondenaa failed to use reasonable diligence to acquire any knowledge of the facts.

Again, seventh, I call your Honor's attention to this, that retention of the premium by the Exchange does not constitute any estoppel or waiver which would create

any insurance rights in Helen Sondenaa for the reason that at the time the premium was received by the Exchange the evidence shows they did not know what the factual situation was with respect to the title of the car; this is a circumstance which, in any event, occurred after the loss took place, and Mrs. Sondenaa herself had the policy in her possession at this time.

Finally, at the time, or shortly after the time the premium was received the Insurance Exchange put all of the parties on notice that it regarded the situation as being one where there was no coverage, so that retention of the premium cannot here be considered, under any circumstances, as an admission that there was coverage, that circumstance being completely rebutted by letters sent out to the parties.

Finally, Mr. von Borstel has never made any request for the return of the premium.

If the Court please, those are our points.

APPENDIX B

CHARGE OF THE COURT

The Court: Ladies and Gentlemen, there are a number of questions in this case, but I am only going to submit one to you. I have explained that to the lawyers previously. They argued the case to you somewhat with that background.

The function of a jury, as I know you understand the rules, is to try disputed questions of fact. Questions of law are for the decision of the Court, and there are some questions of law in this case, as you have observed.

It will be your function to decide the dispute as to what was said at The Dalles between Lawrence and von Borstel. There is a dispute between them that you will have to decide. Jurors very often have that very thing to do—to decide where the stories clash and cannot be reconciled. Bad memory or misunderstanding often enter into it. Sometimes one answers one way and the other answers the other way—answers the opposite—and both believe they are telling the truth.

In this case, regardless of what the attorneys have

stated, that is the dispute which I am going to submit to you for decision.

This plaintiff, like every plaintiff, has the burden of proof, and must satisfy you by a preponderance of the evidence, that von Borstel's version of what happened there is the correct one—must prove that to your satisfaction by a preponderance of the evidence, and greater weight of the evidence. If you are so satisfied, your verdict must be for the plaintiff. If you are not so satisfied, your verdict will be for the defendant.

Von Borstel says that he went to Lawrence, the District Agent for these companies at The Dalles, and told him he was giving a Plymouth car to a married daughter who lived in Toledo, and he wanted to know what was necessary to make sure that the insurance on it was good after he gave her the car. That is a rough way of putting it.

He says that Lawrence, the agent, told him that his daughter should go to the company's agent down there in that country where she lived, and that she should "sign the policy." I don't know what that means, and that is one of the things you will have to figure out.

He claims having communicated that to his daughter. Actually, they claim they understood from that, because she was his daughter, the car was still in the

family and the car would remain in the family and the insurance would be good and the insurance would protect her ownership, in accordance with the terms of the policy.

They claim they understood Lawrence to mean that, while she should go down to the agent, it was not an indispensable requirement, and that the insurance would be effective, so long as he turned the car over to her and the policy, as well.

If you believe that story, by a preponderance of the evidence, and if you feel that the daughter and son-in-law acted on it, and, as a result, did not believe under the circumstances it was necessary to make a new application to the company and get the company's approval of the transfer from von Borstel, your verdict should be for the plaintiff.

If you do not believe that by a preponderance of the evidence, and that is if you don't believe von Borstel's version of it, then your verdict will be for the defendant.

That is the only question I submit to you. You are the exclusive judges of the credibility of the witnesses and of the weight and the value of their testimony. You will take the exhibits with you to the jury room and will give them such weight as you feel they are entitled to.

Your verdict must be unanimous. Upon retiring to the jury room you will elect a foreman who will sign your verdict. Take the jury upstairs, Major.

Do not begin to deliberate on the case, Ladies and Gentlemen, until we send up the exhibits.

Swear the Baliff.